In the

Supreme Court of the United States

October Term, 1950

No. 776

[illegible] SIGHTSEEING COACHES, INC.

v.

THE CITY OF NEW YORK

In the Matter

of the Petition

of [illegible] SIGHTSEEING COACHES, INC.

for a Writ of Certiorari

[illegible] SIGHTSEEING COACHES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 779

CIRCLE LINE SIGHTSEEING YACHTS, INC.,
Petitioner,

—against—

THE CITY OF NEW YORK,
Respondent.

In the Matter of
The Petition of CIRCLE LINE SIGHTSEEING YACHTS, INC., as Owner of the motor vessel SIGHTSEER VIII, in a cause of exoneration from or limitation of liability for damages arising out of a collision in the Harlem River on September 6, 1956, between said vessel and the Madison Avenue Bridge,

CIRCLE LINE SIGHTSEEING YACHTS, INC.,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

1.

This is not a negligence case. It is, rather, one concerned with the substantive rights of a litigant under the statutory-burden doctrine of admiralty as expressed by this Court in *The Pennsylvania,* 86 U.S. (19 Wall.) 125, and as so frequently applied by the lower federal courts.

Nor is the case one involving an issue as to the correctness of factual findings. Petitioner is acutely aware of the burden imposed on this Court by the volume of petitions filed for writs of certiorari, and certainly would not presume to make this application except on grounds considered by petitioner and its counsel to be of merit.

Petitioner does not question the power of a Court of Appeals to make, from an appropriately framed trial record, a finding that is inconsistent with or contradictory to a finding made by the District Court; nor does it question the power of a Court of Appeals to draw from findings of fact conclusions that are inconsistent with or contradictory to the conclusions that the District Court drew from those findings.

In this case, for example, the question of compliance by petitioner's vessel with the "Narrow Channel Rule," 33 U.S.C. § 210, was exhaustively litigated in the District Court; in fact, that issue appeared to be the sole interest of respondent until the time of the appeal. The Court of Appeals approved the conclusion of the District Court that petitioner's vessel had not violated the rule (R. II-107a, 108a; App. to Petition A-4, A-5). Had the Court of Appeals reversed the District Court with respect to that conclusion, its act, although patently erroneous, would not for that reason have been an inordinate exercise of appellate power; and if the Court of Appeals had held, further, that petitioner had failed to sustain the burden imposed on it by *The Pennsylvania*, 86 U.S. (19 Wall.) 125, with regard to violation of the "Narrow Channel Rule," it would have been acting within the scope of its power under that decision and *McAllister* v. *United States*, 348 U.S. 19, for petitioner was made aware during the trial that the issue was material and was afforded process by which to sustain the burden.

Petitioner does question most gravely the power of a Court of Appeals, in an admiralty case, to make a finding

from a record that establishes that the factual issue designed to be resolved by such a finding was not brought to the attention of the District Court; for such an act is beyond the extent of the power of the Court of Appeals as specified in *McAllister v. United States*, 348 U.S. 19.

And even more clear is the error of the Court of Appeals, having superimposed its statutory-presumption finding, in concluding that a burden imposed only by that finding had not been sustained. Though it may be assumed that there are circumstances in which a Court of Appeals may properly draw a conclusion from a factual finding that it alone has made, such an act can not be proper in a case where the newly made finding is one of statutory or quasi-statutory violation in admiralty, which creates "the burden . . . of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been," *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 136. For the act of the Court of Appeals in drawing that conclusion is a denial of the right of the statute-violator to carry the burden that this Court has said it must carry.

2.

Petitioner did not undertake in its petition to demonstrate the manner in which it will show, if this Court by an order of remand affords it the opportunity to show, that the finding of the Court of Appeals as to inadequacy of lookout was wrong and that its conclusion respecting the statutory-burden issue was wrong; for petitioner understands such factual argument to be improper in presentation of a petition of this nature.

Whether or not petitioner can prove facts is immaterial; whether or not it may properly be denied the process by which factual proof may be adduced is critical.

3.

Respondent states, at page 6 of its brief in opposition:

> "The Court of Appeals found that there was substantial evidence that a lookout might have seen the opening bridge earlier, and that certainly petitioner had not carried its burden, under the rule of *The Pennsylvania,* 86 U.S. (19 Wall.) 125 (1873), of establishing that the absence of a lookout could not have contributed to the accident."

That inaccurate statement touches the core of the matters presented on this petition. Indeed, if there were such evidence in the record, petitioner would not consider this petition meritorious.

The Court of Appeals made no such finding, although it did conclude (R. II-109a; App. to Petition A-6):

> "In view of the fact that the ship had almost stopped by the time it hit the bridge, it is quite possible that a lookout with no other duties could have seen the opening bridge earlier and either avoided the accident or at least diminished its severity."

On the basis of that conclusion, and that only, the Court of Appeals held that petitioner had failed to sustain the burden of the Pennsylvania Rule.

But, if "it is quite possible" that a lookout could have avoided the accident or diminished its severity, it is also, by definition, possible that a lookout could not have avoided the accident or diminished its severity.

Petitioner asks only that it not be foreclosed from proving that the latter of those possibilities was the fact.

4.

It can hardly be questioned that the matters raised on this petition are of paramount importance to the mari-

time industry. The rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125, has been and will continue to be a force of far-extending impact on admiralty litigation, affecting virtually every cause of marine collision.

It is essential that the federal bench and admiralty bar enjoy a clear understanding of the meaning and intent of the rule, of the burden that it contemplates, and of the right intended to be afforded to a party to undertake that burden, if it must, and to sustain it, if it can.

Should the present decision of the Court of Appeals be permitted to stand, an admiralty litigant would be compelled, on trial, to raise issue on its own motion as to every conceivable matter of statutory and quasi-statutory conduct concerned however remotely with the incident in question, and then not only to prove compliance but also affirmatively to demonstrate that possible non-compliance could not have been related causally to the incident; failing that, the party would be exposed, as petitioner has been exposed here, to the simultaneous creation and adverse determination of a presumption on appellate review.

Petitioner respectfully renews its prayer that the writ issue, and that, upon its review, this Honorable Court be pleased to order the judgment of the Court of Appeals reversed and these causes remanded for further proceedings consistent with the doctrine stated by this Court in *The Pennsylvania*, 86 U.S. (19 Wall.) 125, and such other and further relief as to this Court may seem proper.

Respectfully submitted.

WARNER PYNE,
WILLIAM A. WILSON,
Counsel for Petitioner.

ALBERT ROBIN,
Of Counsel.

Dated New York, New York
April 11, 1961.